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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 231

ANNA DESPER, Administratrix of the Estate of THOMAS J. DESPER, JR., Deceased,

Petitioner,

vs.

STARVED ROCK FERRY COMPANY, a corporation,

Respondent.

PETITIONER'S REPLY BRIEF.

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It is not essential to status as a member of a crew that a ship be in navigation.

No reasons were suggested by the Court of Appeals, and none have been suggested by respondent, why navigation is essential to status as a member of a crew. Neither the Court nor respondent has commented on the decision in *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. 2d 597 (6th Cir.), cert. den. 328 U. S. 858, that the employee was a seaman during the fitting out period, although the ship had been laid up for the winter and was just as much "with-

drawn from navigation" as were the boats in the instant case. Although the *Weaver* case was an action under the Fair Labor Standards Act, the controlling question whether the employee was a seaman was determined by reference to Jones Act cases.

Neither the Court of Appeals nor respondent has mentioned that in *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.), a proceeding under the Longshoremen's Act, the decision that the weight of the evidence supported the finding that the employee was not a member of a crew was on the ground that the crew had not been chosen at the time of his death, which occurred during the fitting out period after the ship had been laid up all winter. There was not the slightest intimation by the Court that a ship in navigation was a prerequisite to status as a member of a crew. There was some evidence that the employee was hired for the season as assistant engineer, and it seems apparent that if suit had been brought under the Jones Act, it would at least have been a question for the jury whether the employee was a member of the crew.

Respondent also ignores *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779 (2d Cir.), another proceeding under the Longshoremen's Act, where, although a passing reference was made to the ship's being withdrawn from navigation, the entire emphasis of the decision was on the complete absence of navigational duties considering the year-round employment, and the clear import of the decision is that such duties would have made the employee a crew member even if the ship were not in navigation. These cases are squarely in conflict with the instant decision holding navigation to be a prerequisite.

Even if navigation were essential, the cases cited at pages 14 and 15 of the petition show that petitioner's proof met this requirement.

Respondent attempts to distinguish *Hunt* v. *United States*, 17 F. S. 578 (S. D. N. Y.) on the ground that Hunt slept and ate on the boat and was subject to ship's discipline; that he was admittedly a seaman and the vessel "was tied up awaiting its next voyage" (Brief, p. 26). Decedent, a licensed operator, was unquestionably a seaman too. Hunt's status as a crew member was as much in issue as decedent's. Respondent is in error in asserting that the vessel in the *Hunt* case was tied up awaiting her next voyage. She had been in drydock a week, undergoing repairs, at the time of the accident, remained in drydock nine weeks thereafter, and it did not appear how long after that she took on cargo and began her next voyage. She was in every real sense farther withdrawn from navigation than the boats in the instant case. No effort is made by respondent to show why the vessel in the *Hunt* case should be regarded as in navigation, and the boats in the instant case held as a matter of law to be withdrawn. This is the vital point of conflict between the two cases, and respondent ignores it.

It is no answer to say that Hunt was under ship's discipline and lived on the boat, while decedent lived at home, was not under discipline, and there were no ship's officers under whose command he acted. The absence of these secondary factors is wholly irrelevant, and can only be significant where they were invariably, or at least customarily present when the employee was a crew member. There was not a scintilla of evidence that any of these factors obtained during the season, when decedent and the other licensed operators were running the boats, when,

even respondent must agree, they were under the Jones Act. Respondent concedes that riverboat operators never worked under shipping articles, but it is claimed there is no support in the record for our statement that they never worked under ship's discipline or lived on the boats. We feel confident that if there had been any such practice or custom (which in any event is wholly immaterial) it would have been made to appear during the trial. Decedent was the captain and crew of whatever boat he was operating. *Norton* v. *Warner Co.*, 321 U. S. 565, 571. His status as such was entirely unaffected by the fact that he went home at the end of his day's work.

References to cases in which it is stated that no crew was aboard, or organized, and no ship's discipline being enforced, are wholly irrelevant in the present context. Whether or not the other operators had been hired at the time of decedent's death is likewise without significance, since, if the accident had not occurred and none of the other crew members had been hired when the sightseeing trips were due to begin, operations could have been carried on by decedent and respondent's manager who also acted as pilot (R. 110). The fact that respondent deferred hiring other operators until the preliminary work of fitting out the boats had been completed has no possible bearing on the issues involved herein.

The attempt to place controlling significance on the absence of these minor factors cannot obscure the fact of conflict of the instant case with those cited at pages 14 and 15 of the petition, and with *Taylor* v. *McManigal*, 89 F. 2d 583 (6th Cir.) and *Seneca Washed Gravel Co.* v. *McManigal*, 65 F. 2d 779 (2d Cir.). Such attempt is equivalent to saying that if these secondary factors or some of them are present the ship need not be in navigation—a position directly opposed to that taken by respondent at pages 21-24 of its brief.

Respondent argues at brief pages 23, 24, that where a ship is temporarily out of service she may be regarded as still in navigation if her crew is kept intact and ship's discipline observed, but if she is laid up any length of time and her crew dispersed, she is withdrawn from navigation. (*Union Oil Co.* v. *Pillsbury*, 63 F. 2d 925, cited at page 24, does not deal with this question.)

But in *Hunt* v. *United States*, 17 F. S. 578 (S. D. N. Y.) the vessel was in drydock for ten weeks and her crew were not kept intact, but she was not considered to be withdrawn from navigation. Likewise in *U. S.* v. *Lindgren*, 28 F. 2d 725, 728 (4th Cir.) where the ship had been laid up for an undisclosed period and then taken to drydock for repairs, and the crew were hired during the course of this work, and decedent, employed as third officer, came aboard for the first time the morning of his death. There is no distinction between the status of the ship in the *Lindgren* case and respondent's vessels in the instant case, except that the latter may well have been closer to actual navigation.

The Court of Appeals and respondent attempt to distinguish between a ship in drydock, which they say is still in navigation, and one which is laid up for the winter, which they declare to be withdrawn. The rationale of such distinction is not given, and we respectfully suggest that a reasonable interpretation of the Jones Act does not permit the denial of its protection by the rigid and invariable application of the rule that a ship laid up for the winter is withdrawn from navigation. It may be that during the winter season, before the work of preparation for the coming season has begun, a ship may be regarded as withdrawn from navigation, but the fitting out period, when the work essential to navigation is being done in considerable part by seamen hired as crew members, can more

naturally and properly be thought of as a part of the navigation period, clearly to be distinguished from the dormant winter season.

Respondent attempts to distinguish *Jones* v. *Shepherd*, 20 F. S. 345 (S. D. Miss.) on the ground that the decedent there was recalled as a member of the crew of the ship, which had been out of service for more than a month, and was doing the work of a roustabout, which he had done as a crew member. But decedent in the present case was also recalled as a crew member and was doing the fitting out work which not only was absolutely essential before the boats could be operated, but which defendant's crew members customarily did. The statement, at page 27 of respondent's brief, that he was hired to do general labor is directly in conflict with the evidence that he was employed for the season for the dominant purpose of operating respondent's boats. The attempt to label the decedent as one of a mere gang of shore workers (brief, p. 24) is wholly unwarranted in view of the evidence in this case. He cannot be placed in the category of the other men, mentioned at page 2 of respondent's brief, who were mere laborers doing part of the fitting out work, but were not hired as seamen, and were to be discharged as soon as their work was finished (R. 113).

It is asserted repeatedly in respondent's brief that decedent was paid by the hour, and this is urged as an important factor militating against his status as a crew member. Just as in the matter of living off the boat and not being subject to ship's discipline, there is no evidence in the record that riverboat operators were invariably or customarily paid on any other basis. The important fact, which respondent cannot dispute, is that Desper's rate of pay was the same throughout his entire employment, which proves that he had one indivisible job, rather than that he

was hired first as a boatyard worker and then later hired as a crew member.

Respondent places much emphasis on the boats' being on a marine track, on land, rather than in the water or in drydock—a wholly irrelevant factor in determining decedent's status as a seaman. Moreover, the marine track led directly into navigable water, and once ready the boats could be run into the water in a very few minutes. No essential distinction is pointed out between a drydock and a marine track, and no comment is made on the authorities (*Cont. Cas. Co.* v. *Lawson*, 64 F. 2d 802, 5th Cir.; *Maryland Cas. Co.* v. *Lawson*, 101 F. 2d 732, 5th Cir.) which hold them to be equivalent.

Respondent calls attention to what it regards as our error in referring to decedent as a licensed navigator. His license (R. 224) was to operate or navigate motor boats (we used navigate in the sense of operate) and qualified him to operate motor boats under 65 feet in length carrying passengers for hire on any navigable waters of the United States, including the ocean (R. 149). To sail or manage a vessel is to navigate it. This is the very essence of a seaman's function. That he may not have been a navigator in the sense of one skilled in determining a ship's position by the principles of geometry and astronomy is unimportant here, and does not affect his status as a seaman in the slightest degree. If stewards and chambermaids can recover under the Jones Act (*Carroll* v. *U. S.*, 133 F. 2d 690 (2d Cir.); *McLeod* v. *Union Barge Line Co.*, 95 F. S. 366, W. D. Pa.), and a barber can be held to be a seaman (*Agnew* v. *American President Lines*, 73 F. S. 944, 951, N. D. Cal.) it is hard to see why petitioner should be denied the benefits of the Jones Act as a matter of law.

The Jones Act, as interpreted by this Court, requires that the term navigation be given a broad and flexible meaning to include the fitting out period.

Assuming there is any reasonable basis for contending that seamen hired as crew members for the season, while engaged in preparing their boats for use in navigation, do not attain their status as crew members until the boats are actually placed in service—a contention, we submit, which is not in harmony with this Court's decisions in the *Haverty* (272 U. S. 50), *Bassett* (309 U. S. 251), *O'Donnell* (318 U. S. 36) and *Swanson* (328 U. S. 1) cases—still, in any event, a liberal interpretation of the Jones Act requires submission of the question of status to a jury. A jury would have the right to infer that when there is a definite present intention to place boats in operation (see *Carumbo* v. *Cape Cod S.S. Co.*, 123 F. 2d 991, 995, 1st Cir.) and the fitting out work has begun, they are sufficiently "in navigation" to give the status of crew member to those hired as such.

The Court of Appeals states (opinion page 9) that the boats would not be in navigation until they had again been "placed in service." But under this rigid rule, if sightseeing trips were scheduled to begin at noon on May 1, an operator making a test run of a boat on the morning of that date would be excluded from the benefit of the Jones Act—an obviously harsh interpretation of the Act. We submit that no precise time may be fixed, as a matter of law, at which the boats are to be deemed in service. Suppose they are in the water and can be operated, but necessary work remains to be done on their engines and hulls before they can be safely used in carrying passengers? Suppose they lack some equipment necessary to their lawful operation? And if they could still be regarded as in

service, would they be in service only from the moment they reached the water? Suppose nothing remained to be done except to move them a few feet down the runways into the water? We respectfully submit that no invariable rule can or should be declared.

This Court has recognized in *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, that the term crew does not have an unvarying legal significance and it is equally apparent that the term navigation has no fixed meaning. There is no rule by the application of which one can say that at a given time a ship was not in navigation, but that the following day, or hour, she was. We submit that a ship can be held to be withdrawn from navigation as a matter of law only when such withdrawal is definite and permanent, as where she has been relegated to a ship's graveyard. *Hunt* v. *United States*, 17 F. S. 578, 583 (S. D. N. Y.); *Gonzales* v. *United States Emergency Fleet Corp.*, 3 F. 2d 168 (E. D. N. Y.). The jury's verdict in this case, and the judgment of the District Court, were fully supported by the evidence. In the very recent case of *In Re Pate's Estate*, 106 N. Y. S. 2d 378, 381, the Court said:

> "Recent federal cases involving the Jones Act have, in general, disclosed a tendency toward scrupulous avoidance of any possible encroachment upon the sphere of the jury in allowing recoveries."

We submit that the instant decision, encroaching upon the jury's function, is completely out of harmony with this salutary tendency.

It was not the intention of Congress that the term member of a crew should be narrowly construed to exclude seamen hired as crew members and injured while fitting out their ships, so as to place such employees under state or federal compensation acts and deny them the benefits of the Jones Act.

Congress intended, in passing the Longshoremen's Act, to provide compensation for those maritime workers who this Court had held in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 could not constitutionally be brought within state compensation acts. Seamen, however, preferred their rights under the admiralty law and the Jones Act, and at their request masters and crew members were excluded from the Longshoremen's Act. Having excluded them, Congress cannot be considered to have intended that nevertheless as many of them as possible should be brought within the federal and state compensation acts by the device of narrowly construing the term member of a crew. As this Court said in *Norton* v. *Warner*, 321 U. S. at 571:

> "But where Congress has provided that those basic rights [of seamen] shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption [of a master or member of a crew from the Longshoremen's Act] to be narrowed whether by administrative construction or otherwise."

The decisions cited at page 8 of our petition, permitting awards under state compensation acts where either such acts or the Longshoremen's Act might apply did not involve employees hired as crew members, and no rights were claimed under the Jones Act in any of them. The fields covered by the Jones Act and the various compensation acts do not overlap, the Jones Act being exclusive where it

applies. Petitioner had the undoubted right to pursue her remedy under that Act in the federal courts although proceedings under the state compensation act (initiated by respondent) were pending. *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416, 418 (2d Cir.), cert. den. 324 U. S. 872, which so holds, is not commented upon in respondent's brief, and our statement concerning the compensation proceedings at page 7 of the petition, is not disputed. Under such circumstances it is futile to urge that both parties have submitted to the jurisdiction of the Illinois Industrial Commission and to imply that petitioner's right to pursue her federal remedy has been foreclosed or prejudiced.

The Court of Appeals construed the Jones Act narrowly.

We respectfully submit that decedent was a member of a crew on any of three theories: (1) his work at the time of his death was so closely related to his dominant task of operating respondent's boats as to be practically part of it; (2) his main employment determined his status as a crew member during the fitting out period incidental to it; (3) the 1939 amendment of the F.E.L.A., applied in the admiralty setting, gave such status to employees any part of whose duties was that of a crew member. Whether the emphasis be on the work he was doing when he was killed, on his dominant employment, or on the 1939 amendment, the result is the same.

The Court of Appeals in construing the Jones Act ignored or refused to consider the main purpose for which decedent was hired, and the relation of his work at the time of his death to that main purpose. It considered this work in isolation, and erroneously placed him in the same category with those shore workers who had no navigational duties and were to be discharged when the fitting out work was completed. The artificial separation of decedent's

work into two mutually exclusive phases involves a narrow and unwarranted interpretation of the term seaman, as used in the Jones Act, which is in conflict with the decisions of this Court.

The test of the applicability of the Jones Act as stated in *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36, and *Swanson* v. *Marra Bros.*, 328 U. S. 1, is the relation of the services rendered to the operation of a vessel plying in navigable waters. If they bear a necessary relation to it, and are done as an incident to primary navigational duties, the Act clearly becomes applicable. No reason has been suggested why the vessel need be plying in navigable waters, or engaged in navigation, at the time the services are performed. As this Court said in the *O'Donnell* case, the remedy is given to seamen as such, and if injured in the course of their employment, they are within its purview. The repair of a vessel on dry land, as we have shown at page 14 of the petition, is maritime and within the admiralty jurisdiction, whether it be regarded as in or out of navigation.

Our position is not, as respondent asserts at page 25 of its brief, that all employees whose work is maritime are under the Jones Act. We cited this Court's decisions that repair work on vessels is maritime for the purpose of showing that it has always been regarded as having a close and intimate relation to navigation, and that admiralty jurisdiction is not dependent upon a ship's being actually in navigation. Fitting out work is, of course, indistinguishable in principle. While the maritime nature of the work does not of itself bring employees within the Jones Act, it is conclusive in the case of seamen.

It is interesting to note that the passage quoted by respondent at page 22 of its brief, and in part by the Court

of Appeals at page 9 of the opinion, from *Antus* v. *Inter-ocean S. S. Co.*, 108 F. 2d 185, 187 (6th Cir.) indicates that the Court there thought that the maritime or non-maritime nature of the work was the controlling consideration. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263; *Frankel* v. *Bethlehem-Fairfield Shipyard*, 46 F. S. 242, 132 F. 2d 634 (4th Cir.); and *Massman Const. Co.* v. *Bassett*, 30 F. S. 813, (E. D. Mo.) cited at page 24 of respondent's brief, do not support its claim that decedent's work was non-maritime. The *Frankel* and *Massman* cases involved new construction; the *Nordenholt* case did not hold that employment on a dock unloading a vessel was non-maritime, but applied the doctrine of local concern. None of the cases involved a seaman hired as such who sustained injury while fitting out his vessel for use in navigation.

The federal decisions are in conflict on the question whether the entire range of the employee's duties is to be considered in determining whether he is a member of a crew.

The Court of Appeals for the second circuit in *Long Island R. Co.* v. *Lowe*, 145 F. 2d 516, held that only the duties on the day of the accident may be considered, basing its conclusion on this Court's statement in *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, 258, 260 that the actual duties are determinative. It seems clear that what this Court meant was that the duties the employee in fact performed, rather than the designation of his status, controlled. The captain in the *Bassett* case had included the decedent as a deckhand in making up the ship's complement, but the Court, looking at his entire employment, held his primary activities to be determinative, and found there was evidence to support the conclusion that he was not a member of the crew. Respondent falls into the same error as did the

Court of Appeals for the second circuit, at page 19 of its brief, in quoting from the *Bassett* case on this point.

It had been held in *Wheeler Shipyard* v. *Lowe*, 13 F. S. 863, 82 F. 2d 1022 (2d Cir.) that one who had been employed for five years as a shipyard worker, who was drowned during a storm while piloting a motor boat in the open ocean two miles from shore, at the employer's direction, was not a member of a crew at the time of his death because the essential nature of his employment was that of a shipyard worker. And in *Wm. Spencer and Son Corp.* v. *Lowe*, 152 F. 2d 847 (2d Cir.) the Court compared the navigational with the longshore duties of the employee's entire service in holding that he was essentially a longshoreman. In its latest expression on the subject, the Court in *Merritt-Chapman and Scott Corp.* v. *Willard*, 189 F. 2d 791, 792 (2d Cir.) said:

> "Nilsen's primary duties had to do with cargo and were such as are ordinarily performed by harbor workers. The *Bassett* case, 309 U. S. 251, 260, 60 S. Ct. 544, 84 L. Ed. 732, apparently makes primary duties the test. See also *Wm. Spencer and Son Corp.* v. *Lowe*, 2 Cir., 152 F. 2d 847, 848."

These cases cannot be reconciled with the *Long Island* case, nor with the instant decision, which is in agreement with it in principle.

The Court of Appeals for the fifth circuit, in *Daffin* v. *Pape*, 170 F. 2d 622, expressly followed *Long Island* v. *Lowe* on the point in question. (We wish to point out that the 1939 amendment of the F.E.L.A. was not called to the Court's attention in either of these cases.) But in the *Daffin* case the employee, for several months before the accident, had spent from 80 to 90 per cent of his time preparing the defendant's yacht for trips and sailing with it, and it was apparent that the Court considered that his

employment was primarily that of a member of a crew. On whatever ground the decision is based, it is in conflict with the instant decision, where decedent was doing basically the same thing—getting a boat ready for a trip—and the essential nature of his employment was that of a member of a crew.

In a number of other cases the employee's primary duties, and the essential nature of his employment considering its entire scope, determined whether he was a member of a crew. *Gonzales* v. *R. and F. Lee Ferry Co.*, 43 F. S. 366 (S.D.N.Y.); *Pioneer S. S. Co.* v. *Backwell*, 57 F. S. 650, 652 (N. D. Ind.); *Tucker* v. *Norton*, 56 F. S. 61, 151 F. 2d 96 (3rd Cir.); *Walling* v. *Bay State, etc., Co.*, 149 F. 2d 346, 349, 351 (1st Cir.); *Carvalho* v. *Fregata*, 42 F. S. 404 (D. Mass.); *Schantz* v. *American Dredging Co.*, 138 F. 2d 534 (3rd Cir.); *Smrekar* v. *Bay and River Nav. Co.*, 69 Cal. App. 2d 654, 160 P. 2d 85, cert. den: 326 U. S. 782; *Pac. Employers' Ins. Co.* v. *Pillsbury*, 39 F. S. 673 (S. D. Cal.); *Seneca Washed Gravel Corp* v. *McManigal*, 65 F. 2d 779 (2d Cir.).

It is argued at page 17 of respondent's brief that none of the cases cited by petitioner involves employment on a boat blocked up on land, and that in none were the present duties disregarded and the decision based on the main purpose of the hiring or on future duties. *Wheeler Shipyard* v. *Lowe*, 13 F. S. 863, 82 F. 2d 1022 (2d Cir.), discussed above, and *Carvalho* v. *Fregata*, 42 F. S. 404 (D. Mass.), not cited in the petition, are two cases illustrating these principles.

In the *Carvalho* case an employee hired to serve as cook aboard a vessel, which, when he was hurt, was tied at a wharf and being refitted for use in sword fishing, instead of as a dragger, was held to be a member of the crew although he had not yet performed any of his duties as

cook, but was working as a carpenter. Moreover, this ship, laid up while being converted to an entirely different use, was no closer to actual navigation than the boats in the instant case.

We submit that *Norton* v. *Warner Co.*, 321 U. S. 565, and *South Chicago Coal Co.* v. *Bassett*, 309 U. S. 251, in which all the factors are considered in an effort to ascertain the intrinsic nature of the employment, support the view that the entire range of the employee's duties is to be scrutinized in determining whether he is a crew member. Respondent's insistence that one can be a member of a crew only if he is aiding in the present movement of a vessel is not only directly contrary to the decisions of this Court but also calls for a narrow and unwarranted interpretation of the Jones Act. It is also in conflict with the liberal Congressional intent. Respondent has failed to cite a single case in which, on facts similar to those here involved, the right to maintain a Jones Act suit was denied.

Among the cases cited by respondent in support of the narrow construction urged at pages 18-21 of the brief is *Diomede* v. *Lowe*, 87 F. 2d 296 (2d Cir.), which, since *Cantey* v. *McLain Line*, 312 U. S. 667, which reversed 32 F. S. 1023, 114 F. 2d 1017, is no longer the law, as the Court recognized in *Bowen* v. *Shamrock Towing Co.*, 139 F. 2d 674 (2d Cir.).

Respondent, at page 20 of its brief, states that the principal test in determining whether an employee on board a vessel is a member of a crew is whether his services are *chiefly* in aid of navigation. This is the principal test when the question is whether he is a crew member or a longshoreman or land laborer. It is obvious that its application involves a comparison of nautical with non-nautical duties, and a consideration of the entire scope of the employment. It also emphasizes the very secondary nature of the matter

of living on or off the ship, being subject to ship's discipline, etc. Applied to decedent in this case, it clearly made him a member of a crew. The cases cited at pages 20 and 21 of respondent's brief support the view that decedent was a crew member. In one of them (*Schantz* v. *American Dredging Co.*, 138 F. 2d 534, 3rd Cir.) it was held that the evidence would permit the inference that the employee, a deckhand on a hoister, was a crew member, though he signed no shipping articles, spent six hours of an eight hour day pulling pilings and two helping maneuver the hoister, lived at home and boarded ashore, and was paid for overtime.

It would seem that membership in a crew ought to connote a fair degree of permanence, rather than a precarious status subject to change from hour to hour or day to day depending on what work the employee may be doing at the time, or whether the vessel be in or out of navigation. We think this is tacitly recognized in the cases holding that the character of the work being done at the time of the accident is not controlling, and that a crew member may retain his status as such although temporarily put to work at tasks usually performed by longshoremen. See *Maryland Cas. Co.* v. *Lawson*, 94 F. 2d 190, 192 (5th Cir.); *Carumbo* v. *Cape Co. S. S. Co.*, 123 F. 2d 991, 995 (1st Cir.); *Pioneer S. S. Co.* v. *Backwell*, 57 F. S. 650 (N. D. Ind.). And we believe it is recognized in the cases, including *Norton* v. *Warner*, 321 U. S. at 573, holding that a permanent connection with a vessel is one of the indicia of membership in a crew. While decedent was not assigned to any one boat, but operated any of four during a season five or six months long, no reason has been suggested why he should be any less a member of a crew because he operated four boats rather than one.

The 1939 amendment to the F. E. L. A. is an integral part of the Jones Act, and if any part of decedent's employment was in aid or furtherance of navigation, or directly or closely and substantially affected navigation, petitioner is entitled to recover.

As we have seen, the F. E. L. A. was adopted by the express language of the Jones Act, which gave plaintiffs under that Act the benefit of "all statutes of the United States conferring or regulating the right of action for death of railway employees • • • ".

In 1939 the F. E. L. A. was amended in two respects. The period of limitations contained in that Act was extended from two years to three, and the Act was broadened and liberalized to include in its coverage all employees, any part of whose duties was in interstate commerce.

This amendment has been declared applicable to the Jones Act. In *Chisholm* v. *Cherokee-Seminole S. S. Corp.*, 36 F. Supp. 967, which arose subsequently to the 1939 amendment, suit was started more than two years after the accident, but within three years. The defendant insisted that the suit was barred, since the limitation period was two years at the time it was adopted by the Jones Act, and in that Act there was no express adoption of future amendments. The court held the 1939 amendment applicable, however, saying, pp. 967, 968:

> "But the Jones Act specifically provides that in an action by the injured seaman 'all statutes modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply.' 46 USCA Sec. 688. This was remedial legislation which called for liberal construction. The *Arizona* v. *Anelich*, 298 U. S. 110. It clearly was intended to cover later changes in the Employers' Liability Act."

To the same effect are:

Streeter v. *Great Lakes Transit Corp.*, 49 F. S. 466.
Gahling v. *Colabee S. S. Co.*, 37 F. S. 759.
The Swiftarrow, 34 F. Supp. 541, (reversed on other grounds, 122 F. 2d 98).

We pointed out at page 17 of our petition that the Court of Appeals for the Second Circuit in *Nordquist* v. *U. S. Trust Co.*, 188 F. 2d 776 had held that the provision of the F. E. L. A. permitting suits against receivers of carriers was, in principle, a survival statute, which could be applied to the Jones Act so as to permit suit against the executor of a deceased shipowner. Respondent sees a kinship between receivers of railroads and executors of shipowners, and agrees that the principle of survival established for the one Act is not inappropriate to the other, but it can see none between railroad employees getting their trains ready for interstate movement, and seamen preparing their ships for navigation; and none between the relation of a railroad man's work to interstate commerce and a seaman's to navigation. We submit the analogy is there in both instances, and that the principle which extends the benefits of the F. E. L. A. to a larger group of employees must work a corresponding extension of the benefits of the Jones Act.

It is argued that no application of the principles established for railroad workers can make a seaman out of an ordinary land laborer. The notion that decedent was a land laborer can only be entertained by disregarding the evidence that he was a licensed navigator, hired to operate boats, and, in accordance with respondent's custom, to get them ready. The cases cited at page 14 of respondent's brief have nothing to do with the relation of the F. E. L. A. to the Jones Act, and when carefully analyzed

they are seen to support the position that a jury could reasonably find that decedent was a member of a crew.

Respondent argues, at page 5 of its brief, that to enlarge the concept of seaman (member of a crew) as used in the Jones Act would, in most instances, be to effect a judicial repeal of the Longshoremen's Act. No such result would follow. The amendment does not make crew members of employees who are fundamentally longshoremen, but clearly brings within the scope of the Jones Act seamen, hired as such to navigate boats, while they are engaged in preparing them for use in navigation. The application of the 1939 Amendment to the Jones Act would leave unaffected longshoremen, harbor workers and laborers, not hired as crew members, who are now under the Longshoremen's Act or state compensation acts. The 1939 Amendment is indicative of the intent of Congress to extend the protection of the Jones Act as stated. The broad and all-inclusive language employed in that Act, adopting all F. E. L. A. legislation, made it unnecessary for Congress in the 1939 amendment, to refer to the Jones Act at all.

Counsel assert (Brief, pp. 10, 11) that the 1939 Amendment to the F. E. L. A. shows on its face "that it has no application to the Jones Act"; that petitioner based her right to recover solely on this amendment on the trial of her case; that her instructions Nos. 2 and 3 and one isolated statement made by her counsel (in discussing instructions with the trial court) so shows. These statements are not in accordance with what actually occurred and are quite misleading.

Petitioner's theory was and is that if decedent was hired for the season to operate defendant's boats, and to get them ready for operation, he was a member of the crew not only while he was running the boats, but also when he

was doing the fitting out work. Petitioner's counsel said, at R. 199:

> "As I understand, this man was a member of a crew in the sense he was the crew at the time and in the preparation and fitting out of this boat, getting it ready for actual service in the Illinois River."

And at page 200:

> "* * * We said the work was pertaining to fitting out the boats which were to be used in the immediate future and this work was part of the operation of the boats * * *."
>
> "We do contend, Judge, that was part of the work of a member of the crew."

The court instructed the jury that petitioner alleged in her complaint that decedent was a seaman and had been employed by respondent as a riverboat operator for the year 1948 and to assist in readying and fitting out boats of the defendant for use in navigation; that all or part of decedent's duties was in actual navigation or so closely related thereto as to be substantially a part of it and that both respondent and decedent became and were subject to the provisions of the Merchant Marine Act. It was further alleged that while so engaged in the due process of his employment decedent came to his death as a result of defendant's negligence.

The court's instructions, we submit, given at petitioner's request, correctly advised the jury (R. 209, 211) that if decedent came to his death while he was engaged in navigation through the negligence of defendant as alleged in the complaint they should find the defendant guilty. There was no evidence that anything less than the major part of his time would be spent operating the boats. He would, of course, operate a boat as its crew and such operation would be actual navigation. The provisions of the instruc-

tions, therefore, which embodied the theory of the 1939 Amendment of the F. E. L. A. may be regarded as superfluous. Since the jury found that decedent had been hired for the season to operate the boats and to get them ready and was killed by aiding in the fitting out work, he was under the Jones Act even should the amendment be held inapplicable, and the instructions stated the law correctly and were properly given.

The pertinent part of the Jones Act provides:

> "Any seaman who shall suffer personal injury in the course of his employment [or his personal representative in case of his death] may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *."

Since it cannot be denied that the Jones Act grants to seamen the same common law remedy to recover for personal injury suffered in the course of their employment, as that given railway employees by the F. E. L. A., as amended in 1939, the right of recovery of such employees if any part of their employment is in interstate commerce, must likewise be rendered applicable to seamen, any part of whose duties is in furtherance of navigation.

The 1939 amendment is indicative of the intent of Congress to confer and extend the right of action under the F. E. L. A. to all whose duties, at any time or place, would entitle them to come within its purview. It is also indicative of the intent of Congress to extend the protection of the Jones Act to all seamen whose duties, at any time or place, would entitle them to take advantage of its provisions.

Thus the law stood at the time of the decision in *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36 (1942). The question at issue there was whether a seaman, injured on shore

while in the service of his vessel, could recover under the Jones Act. The court found no difficulty in upholding his right of action, saying, p. 39:

> "There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters. On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting * * * to any seaman injured, in the course of his employment, Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given them the full support of all the constitutional power it possessed."

The court went on to say, pp. 42, 43:

> "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

The Court of Appeals is in error in observing, at page 5 of the opinion, that "even though decedent's death occurred on admittedly navigable waters" petitioner is not entitled to recover under the Jones Act "but is restricted to the remedy afforded by the Longshoremen's and Harbor Workers' Compensation Act . . . " Compensation is not payable under the latter act if the vessel being repaired or refitted is under 18 tons net. 33 U. S. C. A. Sec. 903. Respondent's boats were all under 18 tons net. (R. 193.)

We respectfully ask that the petition be granted and that the judgment of the Court of Appeals be reversed and that of the District Court affirmed.

Respectfully submitted,

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